

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

)  
Amendment of the Commission's Regulatory )  
Policies to Allow Non-U.S.-Licensed Space )  
Stations to Provide Domestic and International )  
Satellite Service in the United States )

IB Docket No. 96-111

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COMMENTS OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby submits the following comments with respect to the Notice of Proposed Rulemaking (the "Notice") in the above-captioned proceeding.

OVERVIEW

PanAmSat, a longstanding and outspoken proponent of maximizing fair competition in the satellite services market, strongly endorses the Commission's tentative conclusion to permit non-U.S.-licensed satellite operators to provide U.S. domestic and international satellite service. Indeed, PanAmSat, in its comments filed in response to the Commission's DISCO I Notice, supported allowing satellite operators licensed by other administrations to provide satellite service within the U.S. market.<sup>1</sup> PanAmSat agrees that encouraging multiple providers to serve satellite users in the United States can lead to lower prices, better service and more innovative service offerings.

PanAmSat also agrees with the underlying premise in the Notice that allowing non-U.S. systems to provide satellite services within the United States will encourage competition abroad and assist U.S. licensees in gaining access to the home markets of such non-U.S. systems. That said, it is essential for the Commission to recognize that the ECO-Sat test will not by itself facilitate the access worldwide that U.S. satellite licensees need to operate globally. The ECO-Sat test is not triggered unless an application is filed seeking U.S.-landing rights for a non-U.S. system. For the many countries that are closed to U.S.-licensed satellite systems but do not seek access to the U.S. domestic and international satellite market for their own satellite systems, no U.S. landing rights application is forthcoming and the ECO-Sat test is not triggered. For this reason, and as discussed in detail below, PanAmSat urges the

<sup>1</sup> Comments of PanAmSat Corporation, IB Docket No. 95-41, submitted June 8, 1995, at 4.

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Commission to take additional steps to increase access to closed foreign markets when the ECO-Sat test is not triggered.

PanAmSat also has concerns, discussed below, regarding: (1) the application of the ECO-Sat test to Intelsat and its future subsidiaries and affiliates; (2) the imposition of a requirement on existing U.S. satellite operators to file information regarding their experiences in gaining access to foreign markets; (3) a reference in the Notice to processing rounds; and (4) the licensing of receive-only earth stations.

I. THE ECO-SAT TEST

A. The "Home Market" and "Route Markets" Inquiry Is Appropriate.

PanAmSat endorses the Commission's proposal to examine, in connection with any earth station application to use non-U.S. licensed satellites to provide satellite services to, from, or within the United States, whether the home market and route markets of such non-U.S. licensed satellites are open to U.S. satellite operators. With regard to the home market analysis, PanAmSat agrees that focusing on the licensing administration is appropriate for three reasons:

(i) the licensing administration is likely to lie within the footprint of the relevant non-U.S. satellite;

(ii) the licensing administration almost always will have direct economic ties with the non-U.S. satellite; and

(iii) there is a close connection between a satellite's footprint and the difficulties of coordinating the satellite internationally, thereby making the licensing administration of critical importance in coordination discussions.

This last point is particularly relevant in light of the Commission's tentative conclusion that the extent to which a licensing country coordinates its satellite systems in good faith with U.S. systems is a relevant factor when determining whether access to the U.S. by a non-U.S. satellite is consistent with other public interest factors.<sup>2</sup> PanAmSat whole-heartedly supports consideration of this factor.<sup>3</sup>

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<sup>2</sup> Notice at ¶ 49.

<sup>3</sup> PanAmSat already is on record as favoring the denial of landing rights to systems that abuse the ITU's procedures. Comments of PanAmSat, File No. ISP-93-014, submitted September 1, 1993.

While the home market inquiry is necessary, it is not, as the Notice makes plain, sufficient.<sup>4</sup> The second prong of the ECO-Sat test — the route markets analysis — is needed to discourage “forum shopping” by non-U.S. satellite operators and to mitigate the anti-competitive impact on U.S. operators if the U.S. operators have access to a non-U.S. satellite’s home market but not to other markets served by the non-U.S. satellite. As the Commission properly recognizes, in light of the inherently regional nature of satellite services, if a non-U.S. system could serve routes that cannot be served by U.S. systems, U.S. licensees would be placed at a substantial competitive disadvantage on all routes because the non-U.S. system would be able to offer a wider range of capabilities.<sup>5</sup>

B. Requiring U.S. Operators to Provide Information Regarding the Foreign Destinations They Can Serve Is Overly Burdensome and Unnecessary.

The Notice proposes to place on applicants desiring to use non-U.S. satellites the burden of demonstrating that none of the countries they intend to serve from the U.S. earth station maintains *de jure* barriers to entry by U.S. satellites.<sup>6</sup> To assist them in satisfying such burden, the Notice proposes that all U.S.-licensed operators should be required to inform the Commission in writing, on an annual or semi-annual basis, of all foreign destinations where they are permitted to provide service, as well as a general description of the services they are permitted to provide.<sup>7</sup> The International Bureau would compile a list of this information and release an aggregate list of all destinations served by at least one U.S. licensee and a description of the services provided to those destinations. The appearance of any country on this list would be *prima facie* evidence that no *de jure* barriers to entry exist.

PanAmSat is opposed to such an approach. First, such a requirement would impose additional administrative burdens on U.S. satellite operators. The imposition of burdensome and, as discussed below, unnecessary, administrative requirements is inconsistent with both the efforts of the International Bureau to streamline its rules and the deregulatory spirit of the Telecommunications Act of 1996.

Second, as the Notice acknowledges,<sup>8</sup> this type of information is highly proprietary. While the Commission does not propose to identify the operators

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<sup>4</sup> Notice at ¶ 26.

<sup>5</sup> Id. at ¶ 11.

<sup>6</sup> Id. at ¶ 39.

<sup>7</sup> Id.

<sup>8</sup> Id.

serving a particular country, because there are only a limited number of U.S. companies providing international satellite services, an individual knowledgeable about the industry could deduce which operator is serving which country based on the list the Commission proposes to publish.

PanAmSat suggests that the Commission take the same approach to *de jure* barriers that it proposes to take with respect to *de facto* barriers: put the application to use the non-U.S. satellite on Public Notice and allow parties opposed to the application to demonstrate that *de jure* and/or *de facto* barriers to entry by U.S. operators exist (or that some other public interest considerations compel denial of the application). If evidence of barriers is demonstrated by a party opposing grant of the application, the burden then would be placed on the applicant to demonstrate why grant of the application is appropriate.

Such an approach eliminates the necessity of a burdensome annual or semi-annual filing requirement and allows the Commission to review applications to use non-U.S. satellites on a flexible, *ad hoc* basis.

#### C. Non-U.S. Satellites and U.S. Satellites Should Be Subject to Comparable Requirements.

PanAmSat strongly supports the Commission's recognition that foreign systems serving the U.S. market must comply with the legal and technical requirements imposed on U.S. satellite licensees in order to ensure fair and effective competition.<sup>9</sup> To ensure that non-U.S. satellites can compete effectively in the U.S. market, the Commission proposes to consider applications to use such satellites contemporaneously with U.S. space station applications in processing rounds or other proceedings.<sup>10</sup>

PanAmSat agrees with the Commission that applications to use non-U.S. systems must be considered concurrently with applications of U.S. satellite operators in order to preserve the ability of foreign-licensed systems to compete in the U.S. market. As PanAmSat has made plain in its submissions in the DISCO I proceeding, however, processing rounds are an inappropriate mechanism to assign frequencies and orbital locations in the international satellite services context.<sup>11</sup> In short, the

<sup>9</sup> Id. at ¶ 53.

<sup>10</sup> Id. at ¶ 16.

<sup>11</sup> PanAmSat Corporation, Petition for Reconsideration, IB Docket No. 95-41, submitted April 11, 1996, at 4-6; Consolidated Reply to Hughes Communications Galaxy, Inc. and GE American Communications, Inc. to Petition for Reconsideration of PanAmSat Corporation, IB Docket No. 95-41, submitted June 5, 1996, at 5-6.

lack of both fungibility among orbital locations and of the existence of a single slot administrator makes processing rounds unworkable in the international context.

D. The ECO-Sat Test Also Should Apply to Section 214 Applications.

The Notice proposes to apply the ECO-Sat test to U.S. earth station applications involving communications with a non-U.S. space station.<sup>12</sup> PanAmSat supports this proposal. The same considerations apply, however, to Section 214 applications to provide service via non-U.S. space stations, and PanAmSat suggests that the Commission broaden the ECO-Sat test accordingly.

II. THE APPLICATION OF ECO-SAT TO INTELSAT AND ITS SUBSIDIARIES/AFFILIATES

A. The ECO-Sat Test Should Apply to Applications to Use Intelsat Satellites Provisionally Assigned to Intelsat's Future Commercial Subsidiary.

PanAmSat does not take issue with the tentative conclusion in the Notice that, in light of Intelsat's original mission, the Commission should refrain from applying the ECO-Sat test to international communications over the Intelsat system.<sup>13</sup> That said, and as the Notice acknowledges, Intelsat is now in the process of creating a commercial, private subsidiary.<sup>14</sup>

While PanAmSat agrees with the Commission that any future Intelsat subsidiaries, affiliates or successors should be treated in the same manner as any other non-U.S. system seeking to access the U.S. market — and, in this regard, the Commission would apply the ECO-Sat test to both the home and route markets of the Intelsat affiliate<sup>15</sup> — PanAmSat urges the Commission to apply this same test to applications to use Intelsat satellites that have been provisionally assigned to the future Intelsat commercial subsidiary.

As Intelsat demonstrated recently in the context of the recent coordination negotiations involving Columbia's operations at 41° W.L. and the Intelsat VIII-A-2 satellite to be deployed at 40.5° W.L. (a satellite that, significantly, has been provisionally assigned to Intelsat's planned commercial subsidiary<sup>16</sup>), Intelsat is intent on using its substantial market power and special governmental privileges

<sup>12</sup> Notice at ¶ 19.

<sup>13</sup> Id. at ¶ 70.

<sup>14</sup> Id. at ¶ 71.

<sup>15</sup> Id. at ¶ 73.

<sup>16</sup> See "Intelsat Future Structure," A Joint Contribution of the Party and Signatory of the United States of America to the Third Meeting of the Intelsat Board of Governors' Special Committee on Future Structure (SCFS-3), dated February 12, 1996.

and immunities to insulate its planned commercial subsidiary from competition offered by U.S.-licensed satellite operators. The Notice states clearly that, "if IGOs are to provide services in competitive markets, they cannot be permitted to leverage the benefits of their intergovernmental status to unfairly distort service."<sup>17</sup> As such, the Commission should apply the ECO-Sat test to U.S. earth station applications that seek to use Intelsat satellites provisionally assigned to Intelsat's future commercial subsidiary.

B. Intelsat Capacity Should Not Be Used For U.S. Domestic Service.

PanAmSat strongly opposes allowing U.S. earth station operators to use Intelsat capacity for the provision of U.S. domestic satellite service. Intelsat's special governmental privileges and immunities give it enormous competitive advantages over U.S. satellite licensees. These advantages are compounded by the fact that the members of Intelsat, as the Notice observes, are the primary if not exclusive providers of FSS and MSS services in most major markets.

The abolition of Intelsat's special privileges and immunities is now under review. Until that process is completed, it would be premature to consider allowing U.S. earth station licensees to use Intelsat capacity for domestic service.

In any event, unless the Commission exercises jurisdiction over Intelsat's space segment, including Intelsat pricing structures, there is too great a potential for Intelsat, through Comsat, to undercut its competitors in the domestic market by cross-subsidizing between its competitive and monopoly services. While reciprocity can serve as an effective means to ensure that foreign satellite systems are acting in the public interest, no comparable mechanism exists, without "piercing the veil" between Intelsat and Comsat, to prevent Intelsat/Comsat from acting in an anti-competitive manner.

III. **ADDITIONAL MEASURES MUST BE TAKEN TO OPEN SATELLITE MARKETS ABROAD**

A. The ECO-Sat Does Not Do Enough To Open Foreign Satellite Markets.

PanAmSat agrees with the premise underlying the ECO-Sat test that allowing operators of non-U.S. satellites to offer satellite services within the United States will encourage competition abroad and assist U.S. licensees in gaining access to the respective home markets of such non-U.S.-licensed operators. That said, the ECO-

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<sup>17</sup> Notice at ¶ 71.

Sat test alone will do little to facilitate U.S. satellite licensees' access to the vast majority of foreign markets.

Few countries are in a position to participate in the U.S. satellite market. The expense of constructing and launching a single satellite, let alone a satellite network, is cost prohibitive for many countries. Those countries able to afford satellites of their own typically focus on domestic or regional services that lie outside the U.S.<sup>18</sup>

In contrast, U.S.-licensed satellite operators, leaders in the separate system satellite market, have a large degree of planned and in-orbit capacity capable of serving nearly every country in the world. PanAmSat itself presently is capable of serving 98% of the world's population. In light of the inherently international nature of satellite services, U.S. satellite operators are often the first U.S. entities seeking to provide communications services within foreign markets. Moreover, as the market routes element of the ECO-Sat test underscores, the economic viability of a satellite hinges on its ability to gain broad market access.

In short, because few non-U.S. satellite systems desire access to the U.S. market and, further, because a number of U.S.-licensed systems are aggressively seeking access to foreign markets, the ECO-Sat test provides little incentive to, and little recourse against, a foreign administration intent on closing its home market to U.S. operators.

B. The Openness of a Foreign Country's Satellite Market Is An Appropriate Public Interest Consideration Under the Broader ECO Test.

Plainly, an additional mechanism must be found to create incentives for foreign governments to open their satellite markets to U.S. satellite licensees. In the Foreign Carrier Order, the Commission adopted an effective competitive opportunities (ECO) test to examine certain requests by foreign carriers to participate in the U.S. communications market. In developing the ECO test, the Commission sought to achieve three objectives: to promote effective competition in the global market for communications services; to prevent anticompetitive conduct in the provision of international services or facilities; and to encourage foreign governments to open their communications markets.<sup>19</sup>

<sup>18</sup> The Notice recognizes that most non-U.S. systems seek to serve their licensing administrations. Id. at ¶ 23. Providing service to licensing administrations effectively precludes serving the U.S. for countries outside the Atlantic Ocean Region and portions of the Pacific Ocean Region.

<sup>19</sup> Report and Order, 11 FCC Rcd 3873 (1995) at ¶ 6

As set forth in the Foreign Carrier Order, the ECO test focuses on the presence of *de jure* or *de facto* barriers that prevent U.S. entities from competing effectively in the foreign entity's home market. While the ECO test is an "important" element in the Commission's determination whether to grant the request of the foreign entity, the Commission also will consider other public interest factors and may grant or deny a request on these grounds.

Specifically, the Commission will consider the general significance of the proposed entry to the promotion of competition in the U.S. communications market; any national security, law enforcement, foreign policy, or trade concerns raised by the Executive Branch; and the presence of cost-based accounting rates.

In light of the fact that the ECO-Sat test by itself will not provide an incentive for most foreign administrations to open their markets to U.S. satellite licensees, PanAmSat urges the Commission to include the openness of a foreign entity's satellite market among the public interest factors it applies when reviewing a foreign entity's request under the ECO test developed in the Foreign Carrier Order. PanAmSat is not suggesting that a foreign entity's request be denied automatically were the Commission to conclude that its home satellite market was closed to U.S. satellite systems. Rather, the ability of U.S. satellite licensees to participate in that market would be another public interest factor that the Commission could weigh when evaluating requests subject to the ECO test.

While PanAmSat is aware that the Commission, in the Foreign Carrier Order, declined to include as a public interest factor the availability of other market access opportunities to U.S. carriers,<sup>20</sup> satellites present a unique situation and, therefore, warrant special consideration. As discussed above, U.S. satellite licensees provide an inherently international service, depend on the openness of foreign markets for their success, and provide a service abroad that few foreign entities are capable of providing in the United States. This last element deprives U.S. regulators of a carrot or, depending on the case, a stick, to assist U.S. licensees in gaining access to foreign markets.

Accordingly, and particularly in light of one of the stated objectives of the Foreign Carrier Order — to encourage foreign governments to open their communications markets — the openness of a foreign carrier's home satellite

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<sup>20</sup> Id. at ¶ 61.



market is an appropriate public interest consideration in connection with application of the ECO test.

#### IV. RECEIVE-ONLY EARTH STATIONS

PanAmSat strongly supports the Commission's proposal to eliminate the licensing requirement for receive-only earth stations operating with U.S.-licensed satellite systems for the reception of services from other countries.<sup>21</sup> As the Notice points out, any technical concerns can be taken into account when the applicable space station is licensed.<sup>22</sup> Elimination of this requirement is also compelled by the abolition in DISCO I of the distinction between U.S.-licensed international and domestic satellites.

PanAmSat agrees with the Commission, however, that, in light of the regulatory framework set forth in the Notice (specifically the tentative conclusion not to require non-U.S. satellites to obtain U.S. space station licenses when providing U.S. service but, instead, to ensure compliance with the Commission's Rules and policies via the earth station application process), it is appropriate to continue to require a license for the use of receive-only earth stations to receive signals from non-U.S. satellite systems, including Intelsat satellites.<sup>23</sup>

In this regard, it is no longer appropriate for the Commission to permit receive-only earth stations to receive Intelsat K satellite transmissions and Intelnet I services without first obtaining a license. Unless a license is required, the Commission will have no mechanism to ensure compliance with its technical rules and competitive policies.

#### CONCLUSION

PanAmSat commends the Commission for initiating this proceeding. Allowing non-U.S.-licensed operators to provide satellite services to, from or within the United States, subject to the ECO-Sat test, should lead to lower prices, better service, more innovative service offerings, and enhanced access for U.S. satellite licensees to the home markets of such non-U.S.-licensed operators. As discussed above, however, the ECO-Sat test alone will not facilitate U.S. satellite licensees' access to the vast majority of foreign markets. Accordingly, the openness of a

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<sup>21</sup> Notice at ¶ 78.

<sup>22</sup> Id.

<sup>23</sup> Id. at ¶ 77.

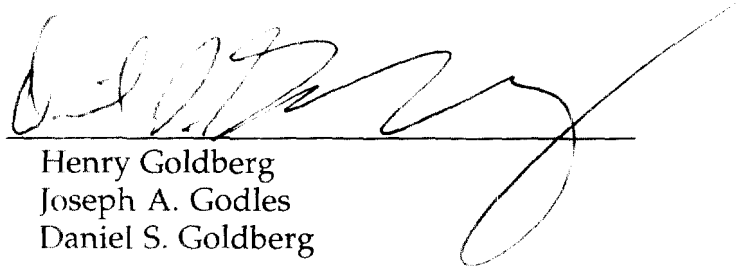
foreign entity's satellite market should be among the public interest factors taken into consideration under the Commission's broader ECO test.

Additionally, to protect the U.S. satellite market from competitive distortions, the Commission should (i) apply the ECO-Sat test to Intelsat's future commercial subsidiary, as well as to earth station applications seeking to use Intelsat space segment capacity provisionally assigned to such subsidiary, and (ii) prohibit the use of Intelsat capacity for domestic U.S. service until Intelsat gives up its special governmental privileges and immunities

Respectfully submitted,

PANAMSAT CORPORATION

By:

A large, stylized handwritten signature in black ink, likely belonging to Henry Goldberg, is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

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